Circuit Court of the United States; Southern District of New York.

WERTHEIMER ET AL. *v.* THE PENNSYLVANIA RAILROAD COMPANY.

The delivery of a bill of lading by a common carrier and its acceptance by the shipper at the time of the delivery of the goods, constitute a contract between the parties embracing the conditions contained in the bill of lading.

The shipper who thus accepts a bill of lading cannot allege ignorance of its terms.

Where a bill of lading exempts a carrier from liability from loss by fire, unless caused by his negligence, the burden of proving negligence is on the shipper.

MOTION for new trial. The action was to recover the value of certain goods of the value of $1700, received by defendants from plaintiffs on July 17th 1877, at New York, for transportation to Pittsburgh.

At the time of receiving the goods, the defendant delivered to plaintiffs a bill of lading, whereby it agreed to transport the goods, subject to several conditions, among which was one that the company should not be responsible for loss or damage by fire, unless it could be shown that such damage or loss occurred through the negligence or default of the agents of the company.

On the 17th of July, the car containing the goods was dispatched by defendant from Jersey City for Pittsburgh, reaching Pittsburgh about 1 o'clock A. M., July 20th, at which time a mob took possession of the defendant's property, including the car in question, and held possession until July 22d, when troops ordered by the governor of the state to aid the sheriff in retaking the property, came in conflict with the mob, failed to dispossess the mob, and the mob fired the property and thereby destroyed it.

A. L. Sanger, for plaintiffs.

Robinson & Scribner, for defendants.

WALLACE, J.—The delivery of the bill of lading by the defendant and its acceptance by the plaintiffs at the time of the delivery of the goods, must be deemed to constitute a contract between the parties, with the conditions contained in the bill of lading: *York Company* v. *Central Railroad Co.*, 3 Wall. 107; *Bank of Kentucky* v. *Adams's Express Co.*, 93 U. S. 174; *Grace* v. *Adams*,

100 Mass. 505; *McMillan* v. *Michigan Southern & N. I. Railroad Co.*, 16 Mich. 79; *Hopkins* v. *Westcott*, 6 Blatchf. 64; *Kirkland* v. *Dinsmore*, 62 N. Y. 171. These cases all hold that the shipper who accepts the bill of lading cannot be heard to allege ignorance of its terms. It is unnecessary to refer to the cases, where from the peculiar circumstances attending the acceptance of the receipt, assent to its terms was held not to be implied, as the present case is the ordinary one, where no peculiar circumstances are shown. Neither are the cases in point, which decide that assent on the part of the shipper will not be implied to any conditions which do not appear on the face of the bill of lading. Such was the case in *Ayres* v. *Western Transportation Co.*, 14 Blatchf. 9, which was decided upon the authority of *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318.

The effect of the contract made between the parties was to impose upon the plaintiffs the burden of proving that the loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark* v. *Barnwell*, 12 How. (U. S.) 272. Mr. Justice NELSON, says: "Although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper to show the negligence." In *Western Transportation Co.* v. *Downer*, 11 Wall. 129, the judgment of the court below was reversed, because the jury were instructed that it was incumbent upon the defendant, the carrier, to bring himself within the exception by showing that it had not been guilty of negligence. Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this court.

The plaintiffs have not shown negligence on the part of the defendant and therefore cannot recover. But irrespective of any considerations concerning the burden of proof, when it appeared, as it did here, that the fire by which the plaintiffs' goods were destroyed was the act of a mob, engaged in a struggle with the military authorities of the state, without anything to show that the defendants were bound, from the circumstances, to anticipate such a result, the defence was affirmatively established.

The motion for a new trial is denied.